

January 2024

# London Luton Airport Expansion

Planning Inspectorate Scheme Ref: TR020001

Volume 8 Additional Submissions (Examination)

**8.153 Applicant's Response to Written Questions - Draft  
Development Consent Order**

Infrastructure Planning (Examination Procedure) Rules 2010

Application Document Ref: TR020001/APP/8.153

**The Planning Act 2008**

**The Infrastructure Planning (Examination Procedure) Rules 2010**

**London Luton Airport Expansion Development Consent  
Order 202x**

---

**8.153 APPLICANT’S RESPONSE TO WRITTEN QUESTIONS –  
DRAFT DEVELOPMENT CONSENT ORDER**

---

<b>Deadline:</b>	Deadline 7
<b>Planning Inspectorate Scheme Reference:</b>	TR020001
<b>Document Reference:</b>	TR020001/APP/8.153
<b>Author:</b>	Luton Rising

<b>Version</b>	<b>Date</b>	<b>Status of Version</b>
Issue 01	January 2024	Additional submission – Deadline 7

# Contents

---

	Page
<b>1 Response to Examining Authority written questions – Draft Development Consent Order</b>	<b>1</b>
<b>References</b>	<b>7</b>

# 1 RESPONSE TO EXAMINING AUTHORITY WRITTEN QUESTIONS – DRAFT DEVELOPMENT CONSENT ORDER

Table 1.1: Responses to the Examining Authority's Written Questions – Draft Development Consent Order

PINS ID	Question / Response
DCO.2.1	<p><b>Question:</b></p> <p><b>Article 45 (2), (3) and (4)</b> Provide a more detailed legal submission as to why these provisions are considered necessary. How they would be consistent with any conditions/ planning obligations on the GHP consent or the relevant London Luton Airport Operations Limited (LLAOL) permission which secure any Environmental Impact Assessment (EIA) related mitigation. How this article would operate in practice and which section of the Planning Act 2008 (PA2008) you consider would permit the inclusion of the provision in the DCO.</p> <p><b>Response:</b></p> <p>In summary, Article 45(2)-(5) manages the interface between the DCO and any other overlapping permissions under the Town and Country Planning Act 1990, which may give rise to an inconsistency between permissions. The drafting of Article 45(2)-(5) is necessary to address any potential uncertainty that may result from the Supreme Court's recent decision in <i>Hillside Parks Ltd v Snowdonia National Park Authority</i> [2022] UKSC 30. The purpose of Article 45(2)-(5) is two-fold:</p> <ul style="list-style-type: none"> <li>- firstly, to ensure one permission is not "lost" by reason of that inconsistency, which is particularly important to the Applicant as both the promoter of Green Horizons Park (GHP) permission and the DCO – it is vital for the Applicant to retain the ability to implement the GHP permission and the DCO both independently and in parallel; and</li> <li>- secondly, to provide clarity and certainty to the relevant local planning authority about how any inconsistency resolves itself for the purposes of planning enforcement.</li> </ul> <p>The specific questions raised by the ExA are addressed below. It should be noted that, in the version of the Draft DCO submitted at Deadline 7, the Applicant has made two key drafting amendments to Article 45(2)-(5) in response to comments made by the Host Authorities at Issue Specific Hearing (ISH) 10 and in post-hearing submissions, and in response to the ExA's comments and second written questions. These amendments are commented on further below and are explained in the Applicant's revised <b>Explanatory Memorandum</b> submitted at Deadline 7 [TR020001/APP/2.02] at paragraphs 3.172-3.176. The Explanatory Memorandum also contains more detailed commentary on the need for and purpose of Articles 45(2)-(5).</p> <p><b>(i) The relationship between article 45(2)-(5) and the conditions/obligations of the LLAOL planning permission and Green Horizons Park permission which secure EIA related mitigation</b></p> <p>Whilst Article 42(2)-(5) is of general effect, it is of particular application to the interface between the DCO and the LLAOL and GHP (GHP) planning permissions. These are addressed in turn below.</p> <p>Although Article 45(2) explicitly references the LLAOL planning permission to avoid any unforeseen inconsistencies arising, it is not expected that any inconsistency will arise. This is because, firstly, the works contained in the DCO application have been designed according to a "baseline" established by the LLAOL planning permission. Secondly, Article 44(3)-(7) makes provision – once the DCO operating regime is activated – for the removal of conditions attached to the LLAOL planning permission, and for abrogation of the LLAOL section 106 agreement. Transitional provision has been made for certain conditions of the LLAOL planning permission which are necessary to carry forward selected works, and these are not inconsistent with the DCO scheme. Accordingly, there is no airport EIA development that will go unmitigated as a result of Article 45(2)-(5)</p> <p>Article 44 does not modify or disapply the GHP permission, not least because it is a separate development (i.e. not a permission for the airport) and furthermore it has not yet been implemented. Instead, Article 45(2) deals with the physical interface between the GHP permission and the DCO.</p> <p>There is a known overlap between the footprint of these two projects. Certain car parking areas proposed by the DCO application conflict with some of the light industrial buildings authorised by the GHP permission, whilst other phased car parking areas delay the introduction of the GHP office space. The access road proposed by the DCO application to the long stay car park, and its associated earthworks, would conflict with hybrid buildings proposed by the GHP permission. Further west, both projects involve authorisation of an access road along the same alignment.</p>

PINS ID	Question / Response
	<p>In circumstances where development under the DCO comes forward which prevents conflicting development under the Green Horizons Park being built, the Applicant does not consider that this would result in the non-delivery of essential EIA development-related mitigation. The development under the DCO which gives rise to the conflict (e.g. car parking) secures mitigation for its own effects. DCO development on Wigmore Valley Park (which overlaps with GHP) has been mitigated by substantial replacement open space with associated biodiversity commitments. The DCO application fully mitigates the effects of the Airport Access Road. To the extent that DCO development prevented overlapping GHP built development on the same land, then it follows that no circumstance would arise in which that GHP built development would itself require to be mitigated.</p> <p>It should be emphasised that each and every condition and planning obligation of the GHP permission which is not inconsistent with the exercise of DCO works and powers would be unaffected by Article 45(2)-(5), including EIA development mitigation, and would still be required to be delivered by those conditions/obligations notwithstanding Article 45(2)-(5). It is therefore important to emphasise, in this regard, that Article 45(2)-(5) does <i>not</i> have a “blanket effect” on all conditions or obligations of overlapping permissions, only on those that give rise to an inconsistency.</p> <p>In short, the Applicant considers that Article 45(2)-(5) would not have the practical effect of resulting EIA development without associated essential mitigation. The ExA is directed to the Applicant’s response under question (iii), which importantly demonstrates that none of the drafting precedents on which the Applicant is seeking to rely saw it necessary to make provision in the drafting in relation to EIA development. The Applicant surmises that this is for the reasons outlined above.</p> <p><b><i>(ii) How Article 45(2)-(5) would work in practice</i></b></p> <p>In response to the Host Authorities’ comments, the version of the Draft DCO submitted at Deadline 7 contains amendments to Article 45(2)-(5) to confirm that it would only “bite” to the extent inconsistent development (e.g. under the DCO) had actually been carried out, or an inconsistent power or right had actively been exercised. This addresses the concern raised by the Host Authorities about the potential for Article 45 to take effect before any inconsistency arises, and so would avoid any unintended consequences. In relation to very minor works which did not give rise to an inconsistency, then by that definition they would not engage Article 45(2)-(5).</p> <p>The Applicant has also included, in revised Article 45(5), a notification mechanism along the lines proposed by the Host Authorities to ensure that the relevant planning authority has sufficient sight of Article 45 being engaged, and should it disagree with the existence of an inconsistency it could engage with the matter accordingly (e.g. via discussions with the undertaker, and ultimately enforcement action). Accordingly, there would be no “gap” in enforcement.</p> <p>Therefore, in circumstances where the Applicant or the beneficiary of another planning permission, during delivery, identified a conflict which engaged article 45(2)-(5), the Applicant/beneficiary would need to make a judgment about how to proceed in accordance with article 45(2)-(5), and notify the local planning authority about how it proposed to proceed on the basis of that judgment. The local planning authority could then determine how it wished to respond in view of that proposal.</p> <p>Importantly therefore, (and having regard to ExA question DCO.2.2 below), Article 45(2)-(5) does not “prevent” the local planning authority from undertaking its statutory functions, including enforcement. Article 45(2)-(5) does not determine as a matter of fact the existence of an inconsistency; that would be determined on a case-by-case basis. If the local planning authority did not consider that an inconsistency existed, it could take enforcement action against the relevant permission according to its argument that Article 45(2)-(5) was not engaged.</p> <p>Article 45(2)-(5), therefore, in fact provides valuable clarity and certainty to the local planning authority about how enforcement powers are engaged in respect of inconsistent planning permissions. In the absence of Article (2)-(5), overlapping planning consents would still exist and the local planning authority would be faced with the <i>Hillside</i> issue, i.e. trying to determine whether either of the overlapping consents were still capable of implementation. This could also have the deleterious effect of “losing” an overlapping permission, which would not be in the interest of the beneficiaries of those permissions (which includes the Applicant) nor the Council which is seeking to foster growth and employment opportunities. This outcome would be avoided with the inclusion of article 45(2)-(5) as drafted.</p> <p><b><i>(iii) Which section of the Planning Act 2008 permits the inclusion of the provision in the DCO</i></b></p> <p>Article 45(2)-(5) is squarely within the scope of section 120(5)(a), (c) and (d) of the Planning Act 2008.</p> <p>As proof of this, Article 45 is not novel, and has clear precedent – see, for example: article 35 of Network Rail (Cambridge South Infrastructure Enhancements) Order 2022; article 3(3) of the Lake Lothing (Lowestoft) Third Crossing Order 2020; and article 6(4) of the Riverside Energy Park Order 2020. There are also a number of DCOs which contain provision which have materially the same effect as article 45(4) (e.g., Article 5(2) of The East Midlands Gateway Rail Freight Interchange and Highway Order 2016, article 44(3) of the West Midlands Rail Freight Interchange Order 2020 and article 6(2) of the Little Crow Solar Park Order 2022). The Applicant further notes that a similar provision is included in article 56 of the draft Lower Thames Crossing DCO, which has been subject to examination and was well received by the host local authorities for that</p>

PINS ID	Question / Response
	<p>project as a necessary and welcome provision (see, for instance, page 25 of [REP5-107] and page 33 (row 33) of [REP3-210] of the Lower Thames Crossing examination library). Finally, a similar provision is included in article 9 of the draft Gatwick Airport DCO.</p> <p>Whilst each of these precedents is drafted in a manner applicable to the specific scheme, the substantive effect of the provision in each case is the same. These precedents highlight the potential necessity for such a provision where a scheme engages overlapping permissions, and that (in terms of the made Orders) the Secretary of State has endorsed them as acceptable, and in accordance with section 120 of the Planning Act 2008 in the case of DCOs.</p> <p>The Applicant would highlight that none of the precedents referred to above include the notification provision now included at Article 45(5) of the Draft DCO, so the Applicant has gone further than precedent in this respect. Furthermore, none of the precedents considered it appropriate or necessary to include any qualification in respect of mitigation for EIA development. The Applicant considers that this endorses the rationale and justification it has provided in response to part (ii) of this question, above.</p> <p>The Applicant notes that the Host Authorities confirmed at ISH10 that they did not object to Article 45 in principle. The Applicant welcomes this position, and considers that the further amendments made to Article 45 at Deadline 7 respond positively and effectively to the comments made by the Host Authorities at ISH10 and Deadline 6. See further ID34 of the Applicant's Response to Comments on the draft Development Consent Order at Deadline 6 [TR020001/APP/8.162].</p>
DCO.2.2	<p><b>Question: NOTE – this question is addressed to both the Applicant and LBC</b></p> <p><b>Article 45 (2)</b> As currently drafted this paragraph would prevent LBC taking enforcement action against non-compliance with the conditions of the GHP or LLAOL permission for any breaches that would occur after a notice was served under paragraph 1.</p> <ol style="list-style-type: none"> <li>1. <b>Applicant:</b> Can you confirm if such a provision is permissible as it would effectively prevent the Council from undertaking one of its statutory functions.</li> <li>2. <b>LBC:</b> As drafted you would be unable to take enforcement against any breaches of the GHP or LLAOL planning permissions. Is this appropriate and what measures would be available to the Council to remedy any breaches if such a function was removed?</li> </ol> <p><b>Response:</b></p> <p>Please see the Applicant's response to DCO.2.1 above under section (ii).</p> <p>The Applicant would stress that the ExA's question DCO.2.2 as worded does <i>not</i> describe the legal effect of Article 45(2)-(5). The provision does not have a blanket effect of preventing compliance with the Green Horizons Park and LLAOL planning permissions once Article 44(1) notice has been served. To clarify, Article 45(2)-(5) only regulates a conflict which arises in relation to the <i>exercising</i> of a DCO power (i.e. it does not have an automatic sweeping effect) and that conflict <i>only</i> prevents enforcement against those elements of the Green Horizons Park or LLAOL permissions which conflict with the DCO work or power, once exercised. Those conflicts are expected to be limited to the physical conflicts listed in response to DCO.2.1 in relation to Green Horizons Park. No conflict is expected to arise in respect of the LLAOL planning permission.</p> <p>Nor does Article (2)-(5) prevent the Council from undertaking its statutory planning enforcement functions. Instead, it provides valuable clarity and certainty to the Council about how enforcement powers are engaged in respect of inconsistent planning permissions. In the absence of Article (2)-(5), overlapping planning consents would still exist and the Council would be faced with the <i>Hillside</i> issue, i.e. trying to determine whether either of the overlapping consents were capable of implementation. This could also have the deleterious effect of "losing" an overlapping permission, which would not be in the interest of the beneficiaries of those permissions (which includes the Applicant) nor the Council. This outcome would be avoided with the inclusion of article 45(2)-(5) as drafted.</p>
DCO.2.3	<p><b>Question:</b></p> <p><b>Requirement 1 – definition of passengers</b> 'Passengers' is defined as commercial airline passengers excluding infants, passengers on diverted planes and passengers on emergency flights. Explain whether this definition would include passengers on private jets and, if not, why not and should it?</p>



PINS ID	Question / Response
	<p><b>Response:</b></p> <p>Whilst the previous definition would not have included general aviation passengers (including passengers on private jets), with such exception reflective of their very small number, the Applicant is content to scope them into the definition and has proposed an amendment to that effect in the latest version of the draft DCO submitted at Deadline 7 as follows: “passengers” means commercial airline passengers <b>and all other general aviation passengers, but excluding infants, passengers on diverted planes and passengers on emergency flights.</b></p>
DCO.2.4	<p><b>Question:</b></p> <p><b>Requirement 8 – CoCP and Unexploded Ordnance (UXO)</b> Section 6.5 of the <b>CoCP [REP6-003]</b> states that ‘A Detailed UXO Risk Assessment would be obtained by the lead contractor prior to construction’.</p> <p>Should this document be added to the list of those to be approved by the relevant planning authority in requirement 8(2)? If not, why not?</p> <p>If not, the CoCP would require a risk assessment ‘prior to construction’. Given that UXO could be encountered during the enabling works permitted under Article 21 of the draft DCO, confirm if this timing is appropriate and, if not, provide alternative wording.</p> <p><b>Response:</b></p> <p>The Applicant does not believe that this document should be added to the list of those documents to be approved by the relevant planning authority in requirement 8(2).</p> <p>The UXO Risk Assessment would be a site-specific, specialist risk assessment, likely based on public records. As it is a risk assessment that will be carried out it is not clear to the Applicant what the local planning authority would be commenting on or approving.</p> <p>If the assessment identifies the potential for UXOs to be present, then the measures as set out in the <b>CoCP [REP6-003]</b> describe the approach that the contractor must take. This includes raising awareness of the risks associated with UXO through site induction processes and toolbox talks.</p> <p>The lead contractor is required to keep a watching brief in any area identified as having the potential for UXO.</p> <p>Should any UXO be found on site, then emergency response procedures to address the hazard would be developed by the contractor. This includes notifying the relevant local authorities, the airport operator and relevant services. The emergency response procedures will be prepared in accordance with <i>Unexploded ordnance, A guide for the construction industry CIRIA C681</i> (Ref 1) or the appropriate equivalent guidance at the time of construction should this be superseded. The relevant local planning authority would be notified about the incident proposed response procedure.</p> <p>The Applicant acknowledges that Article 21 includes provisions for various surveying and investigative works, such as excavation works, trenches, trial holes and boreholes. The latter could involve work to some depth below ground and so raises the possibility of disturbing a UXO should any be present.</p> <p>The intention is that an appropriate risk assessment would be carried out before commencing surveying and investigative works, but the Applicant acknowledges that the CoCP is currently silent on this point. As such, the Applicant confirms that the paragraph 6.5.1 of the CoCP has been updated to confirm that a Detailed UXO Risk Assessment would be obtained prior to carrying out surveying and investigative works as well prior to construction.</p> <p>This additional text to the CoCP means that surveying and investigative works and construction works will be treated in the same way and the measures identified above would also apply to surveying and investigative works.</p> <p>The Applicant will submit an updated CoCP before the end of the Examination, likely Deadline 8.</p>
DCO.2.5	<p><b>Question:</b></p> <p><b>Requirement 17 – definition of emergency flights</b></p>

PINS ID	Question / Response
	<p>Requirement 17 of the draft DCO [REP5-003] excludes 'emergency flights' from the number of allocated slots to be declared in the summer and winter seasons. Requirement 1 provides a definition of 'emergency flights'. Can the Applicant confirm how the definition provided relates to the matters referenced in Green Controlled Growth Framework (Explanatory Note) [REP5-020, paragraph 2.2.42] and if these are equivalent provisions?</p> <p><b>Response:</b></p> <p>Noting the ExA's question, the Applicant has changed the definition of "emergency flights" to "exempt flights" in the version of the Draft Development Consent Order submitted at Deadline 7. The reason for this change is to avoid confusion, because the definition includes certain categories of flights which are not strictly classified as "emergencies" in guidelines for dispensations published by the Department for Transport under section 78(4) or 78(5)(f) of the Civil Aviation Act 1982 – see <i>Consultation on Night flight restrictions at Heathrow, Gatwick and Stansted airports between 2022 and 2024 plus future night flight policy, Annex F: guidelines on dispensations</i> (Ref 2). The remainder of this answer therefore employs the term "exempt flights".</p> <p>Whilst the definition of "exempt flights" encompasses certain Annex F dispensations which do not carry commercial passengers, it does not encompass all Annex F dispensations. It is therefore important to draw a distinction between how "exempt flights" and "dispensations" work operationally in the context of specific DCO documents:</p> <ul style="list-style-type: none"> <li>- in paragraph 1 of Schedule 2 to the Draft DCO, "exempt flights" do not count towards the definition of "passenger" and therefore, do not count towards the passenger cap;</li> <li>- the term "exempt flights" is also relevant to the application of the Green Controlled Growth provisions in Part 3 of Schedule 2. Paragraphs 17 and 23(15)(b) of Schedule 2 provide that "exempt flights" are excluded where the term "...allocated slots" is used;</li> <li>- under the Air Noise Management Plan, "dispensations" relates to the regulation of <i>night-time</i> aircraft movement limits. Dispensations do not count towards night movement limitations. Some dispensations categories relevant to the night noise controls in the Air Noise Management Plan would still qualify towards to the definition of "passengers" and apply in the context of the passenger cap.</li> <li>- under paragraph 2.2.42 of the <b>Green Controlled Growth Explanatory Note [TR020001/APP/7.07]</b>, which has been updated at Deadline 7, the full list of Annex F dispensation categories have been used to inform the definition of "circumstances beyond the operator's control", under which (if applicable and accepted by the Environmental Scrutiny Group) the airport operator is not required to take action following the breach of a threshold or limit.</li> </ul> <p>It follows from the above that the definition and application of the term "exempt flights" under paragraphs 1 and 17 of Schedule 2 to the DCO is different from the dispensations referred to in paragraph 2.2.42 of the <b>Green Controlled Growth Explanatory Note [TR020001/APP/7.07]</b> – and so they are not equivalent provisions.</p>
DCO.2.6	<p><b>Question: This question is addressed to National Highways</b></p> <p><b>Preferred drafting</b> The draft DCO [REP5-003] now includes a protective provision for the benefit of National Highways. The Applicant [REP6-068] has advised that this is based on its preferred drafting and the ExA note that National Highways have submitted a marked up DCO [REP6-113]. At Compulsory Acquisition Hearing 2 (CAH2) [EV13-004] the Applicant indicated that it hoped drafting could be agreed before the close of the Examination. However, in case agreement is not reached, if National Highways want the ExA to consider an alternative form of drafting then this needs to be submitted at Deadline 9 to allow the Applicant to respond at Deadline 10.</p> <p><b>Response:</b></p> <p>The Applicant notes that this question is directed to National Highways. The Applicant continues to negotiate the protective provisions (and related matters) with National Highways and has no further updates at this stage.</p>
DCO.2.7	<p><b>Question: This question is addressed to Network Rail</b></p> <p><b>Request for protective provision</b> At CAH2 [EV13-004] the Applicant advised that it was in negotiations regarding the drafting of a protective provision for the benefit of Network Rail, albeit that such drafting was not currently included in the draft DCO. The Applicant indicated that it hoped negotiations would be successfully completed before the close of the Examination. However,</p>



PINS ID	Question / Response
	<p>in case agreement is not reached, if Network Rail want the ExA to consider an alternative form of drafting to that included in [REP4-200] then this needs to be submitted at Deadline 9 to allow the Applicant to respond at Deadline 10.</p> <p>Can you also provide an update as to whether internal clearance has now been obtained?</p> <p><b>Response:</b></p> <p>The Applicant notes that this question is directed to Network Rail. The Applicant continues to negotiate with Network Rail and the Applicant has confirmed that it is happy to include in the DCO protective provisions for the benefit of Network Rail where such provisions are required and proportionate to the level of potential impact that the Proposed Development may have on assets or apparatus of Network Rail.</p> <p>The Applicant remains hopeful that negotiations will be successfully concluded before the end of the Examination. However, in case agreement cannot be reached, the Applicant confirms that it will submit at Deadline 9 its final version of the Draft DCO to include, if considered necessary, protective provisions for the benefit of Network Rail based on the Applicant's preferred drafting. This will allow Network Rail to respond at Deadline 10.</p>
DCO.2.8	<p><b>Question: FOR INFORMATION – This question is addressed to Affinity Water, Thames Water, Eastern Power Networks Plc and UK Power Network Operations Ltd</b></p> <p><b>Request for bespoke protective provision</b> In your submissions [REP1-030], [REP1-163] and [RR-0402] you requested that the draft DCO should include bespoke protective provisions for your benefit. The Applicant at CAH2 advised that it was in the process of entering into side agreements with each of you and that, in any event, it considered that Part 1, which is a general provision for the protection of electricity, gas, water and sewage undertakers, was sufficient for the protection of your interests. As a result, the Applicant was not proposing to include bespoke provisions for your benefit. If you consider that a bespoke provision would still be required, please provide an explanation why the provisions provided by Part 1 would not be sufficient to protect your interests and provide a form of suggested drafting.</p> <p><b>Response:</b></p> <p>The Applicant is continuing to negotiate side agreements with Affinity Water, Thames Water Utilities Limited, and UKPN (for Eastern Power Networks Plc and UK Power Network Operations Ltd). The Applicant considers that conclusion of those agreements within the Examination phase is likely, and that those agreements would make adequate provision for the protection of those utilities' apparatus such that the addition of bespoke protective provisions (or modification of the existing protective provisions in the Order) is not required.</p>
DCO.2.9	<p><b>Question:</b></p> <p><b>Updated documents</b> The ExA note that several of the documents listed in Schedule 9 have been superseded by documents submitted at D6. When submitting a new version of the draft DCO at D7 please ensure that this schedule has been updated and reflects the latest version of these documents.</p> <p><b>Response:</b></p> <p>The Applicant confirms that it has updated Schedule 9 of the Draft DCO for Deadline 7.</p>

## REFERENCES

---

Ref 1 CIRIA (2009), Unexploded ordnance, A guide for the construction industry CIRIA C681

Ref 2 Department for Transport, Consultation on Night flight restrictions at Heathrow, Gatwick and Stansted airports between 2022 and 2024 plus future night flight policy, Annex F: guidelines on dispensations.